Integrative Liberalism: A New Paradigm for the Law of Political Economy?

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The new volume on the Law of Political Economy (LPE) devises a highly fruitful analytical approach for anyone interested in a better understanding of Europe's current economic and political transformation, and in particular, the role of law in it. LPE has an adequate sensorium if one assumes (1) that society is not static but evolving and that theoretical approaches based on ideas of "equilibrium" (or, in the field of law, on "systemic coherence") are therefore unable to understand social evolution; (2) that social evolution is not merely determined by individual economic interests or by the evolution of capitalism as a whole; (3) that legal structures are among the factors influencing that evolution; and (4) that law, or, to be more precise, *public* law and legislation (as the contribution by Emilios Christodoulidis insists), might even hold one of the keys to social integration.

On each of these points, some of my esteemed colleagues might disagree. But that is a debate for another day. For me, I am enthused by the LPE approach, as mapped out in Poul Kjaer's introductory chapter. It reveals to me the source of difficulties and misunderstandings I face as a lawyer not subscribing to any sort of consequentialist methodology at an interdisciplinary institution dominated by economists. It also demonstrates what fruitful contribution the legal discipline could make to the analysis of economic and political transformations. One of the chief difficulties of social constructivist thinking is the methodology. It is essentially reconstructive. Reconstruction can be messy and is liable to the charge of subjectivism. This is all the more a reason for concern as the epistemology of our age is overwhelmingly digital and numerical, including the fetishization of randomized control tests.

Thinking in Paradigms

In this regard, Poul Kjaer's introduction makes a helpful methodological contribution for social constructivist thinking by tracing the evolution of law in the 20th century in terms of legal paradigms. Legal paradigms are the contemporary, dynamic version of Max Weber's ideal types of law. They describe the dominant background understandings defining the social function of the law in a specific context during a certain period. This ties in with the use of paradigms in the social sciences and in history generally as a way of structuring the analysis of past and contemporary discourse about social phenomena. Andreas Reckwitz, author of probably one of the most influential sociological analyses of the early 21st century, has just made the case for paradigms in understanding the evolution of politics, the economy, and culture. He tracks the sequence of past paradigms that oscillates between openness

and closure, between periods of economic, political, and cultural liberalization and periods characterized by higher degrees of integration and differentiation.

Each modern politico-economic-cultural paradigm in that sequence is affiliated with a corresponding legal paradigm. According to Kjaer, the prevalent legal paradigm shifted from social corporatism during the interwar period, via neo-corporatism during the postwar era, to governance during the period of financial liberalism. And while the political, economic, and cultural forces of each paradigmatic period have certainly left their imprint on the specific legal paradigm, the new LPE volume traces the multiple ways in which law has also influenced social evolution. The focus of the book in that regard is on the recent period of financial liberalism. In particular, Emilios Christodoulidis shows how the watering-down of the public/private distinction allows the market to replace the state; Isabel Feichtner highlights the function of law in entrenching claims to natural resources; and Jotte Mulder and Marija Bartl show processes of marketization through shifts in competition law and consumer law, respectively.

Towards an Integrative Paradigm?

Reconstructive analyses are rooted in the past by design. It is a much greater challenge to sketch out current and even future developments, in the absence of predictive models. Nevertheless, thinking in terms of paradigms might inspire our analysis of contemporary events. The following is an attempt to do this for the current state of the Union.

So far, there is a degree of scholarly consensus that the crisis period of the early 21st century – and you may insert almost any year between 2001 and 2020 as its beginning – has been characterized by more authoritative forms of governance that repressed democratic legitimacy even further, rather than the market. In the EU, severe austerity came together with mushrooming para-constitutional agreements that prefer intergovernmental over democratic modes of decision-making. Fundamental rights took a back seat until the social fault lines appeared at the ballot boxes and the Commission rushed to propose a “social pillar” for EU.

I wonder whether the COVID-19 crisis has helped usher in a new paradigm and to overcome both the governance paradigm accompanying financial liberalism, and the transitory authoritarian tendencies. In a contribution to the latest issue of the German Law Journal (vol. 21#5), I make the case for the rise of “integrative liberalism.” In the context of existential crises, growing geopolitical tensions, backlashes against democratic government and attacks on specific international organizations, I believe the COVID-19 crisis has become the trigger of a fundamental reorientation in the political, economic, cultural, and also in the legal sphere. That reorientation comprises a number of trends:

- Generally, a higher degree of reliance on the state and a simultaneous crumbling trust in the self-regulatory capacity of the market;
- While the market remains a crucial institution for social reproduction, government interventions become more frequent and more intrusive to protect

nations', peoples', and company's essential interests (the current German debate on socializing rental properties, unthinkable a decade ago, is an impressive example);
- A slow but growing orientation towards sustainability goals in economic, financial, health, and energy matters;
- Government intervention in integrative liberalism is improvisational and event-driven, as Luuk van Middelaar has masterfully argued. It contrasts with the neo-corporatist phase of the post-war era characterized by planning and a mechanistic understanding of the economy;
- The role of the law is to moderate the different policies and provide legitimacy. This requires a flexibilization of constitutional frameworks governed by a shift from substance to procedure and from rules to discretion, restricted only by the proportionality principle. In the latter respect, the recent, much-criticized PSPP Judgment of the Bundesverfassungsgericht could be the harbinger of a new era rather than the last surge of epistemic nationalism, as its approach to "judicial dialogue" might make one believe.

On the whole, however, integrative liberalism, if my assumptions are correct, is all but free from risks. Although integrative liberalism might be more sensitive to fundamental rights and sustainability, it uncertain whether it will be more democratic. Moreover, in the past, social paradigms characterized by greater introspection have usually coincided with a repression of societal pluralism. Rising nationalism and economic protectionism in the late 19th century was accompanied by a culture war. The post-war neo-corporatist phase showed little tolerance for schemes of life diverging from that of the heteronormative, white, Christian middle-class. The ugly side of integrative liberalism is already showing – in the empty faces of the drowned washed up on the shores of the Promised Land in the Mediterranean.
